

No. 79-85

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In the Supreme Court of the United States

OCTOBER TERM, 1978

DAVIDSON SUPPLY COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-2b) is unreported. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 1a-13a) is reported at 68 F.C.C. 2d 89.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1979. A timely petition for rehearing was denied on May 18, 1979 (Pet. App. 1c). The petition for a writ of certiorari was filed on July 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission denied petitioner the equal protection of the laws, acted arbitrarily, or took petitioner's property without just compensation, by refusing to grant petitioner a waiver from regulations prohibiting the sale of radios that do not comply with minimal technical standards.

STATEMENT

In 1976, the Federal Communications Commission adopted regulations governing the technical performance of radios used in the Citizens Band Radio Service. See generally, 47 C.F.R. Part 95. The regulations sought to reduce the interference created by citizens band ("CB") radios for television reception and other radio communications by establishing certain minimal technical standards for radio equipment.¹ The regulations prohibited the sale of noncomplying radios as of January 1, 1978, and prohibited the manufacture of noncomplying radios as of August 1, 1977. See 47 C.F.R. 15.59, 95.641(c)(6). The effective date of the regulations was thus

¹From 1974 to 1979 the number of individuals licensed by the FCC to operate citizens band radios increased from fewer than 800,000 to more than 14,000,000. See *Second Report and Order*, 60 F.C.C. 2d 762, 41 Fed. Reg. 32678 (1976); *Memorandum Opinion and Order*, 62 F.C.C. 2d 646, 41 Fed. Reg. 47445 (1976); *First Report and Order*, 60 F.C.C. 2d 687, 41 Fed. Reg. 32590 (1976); *Memorandum Opinion and Order*, 62 F.C.C. 2d 623, 41 Fed. Reg. 47442 (1976).

The regulations apply to citizens band radios which do not meet the minimum radiation-reduction standards adopted by the Commission. Because no 23-channel citizens band radios comply with these standards, the Commission's orders and the petition, for the sake of convenience, speak in terms of the regulations' applicability to "23-channel CB radios." When it adopted the regulations to reduce interference, the Commission also increased the number of available channels to 40. Thus, new models developed to comply with the regulations operate on the 17 additional channels.

delayed 18 months to provide sellers with a reasonable period in which to dispose of existing inventory. The regulation did not distinguish in any way between new and used equipment which failed to meet the minimal technical standards.

Petitioner and several other persons requested a delay of the effective date of the regulation prohibiting the sale of noncomplying radios. The Commission denied the request in November 1977, and that order was affirmed by the District of Columbia Circuit. *Petitions to Extend Cut-off Date*, 66 F.C.C. 2d 1021, aff'd, *Arthur Fulmer, Inc. v. FCC*, 569 F. 2d 159 (D.C. Cir. 1977).² Petitioner did not participate in the judicial review proceeding.

In January 1978, after the regulations prohibiting the sale of noncomplying radios became effective, petitioner again sought a waiver. Petitioner wished to continue its practice of accepting defective CB equipment for exchange or refund, repairing the equipment, and then selling it to new buyers as used equipment (Pet. App. 4a).

The Commission again denied petitioner's request, noting that it had previously denied a similar waiver request by Montgomery Ward (Pet. App. 7a). Petitioner did not question the need for the regulations and the Commission concluded that no fact had been shown that

²The Commission denied several other requests for waiver or delay of the effective date because the regulations had provided ample notice of their requirements and the effective date had been timed to minimize any adverse impact; because the severe interference caused by CB radios required that implementation not be delayed further; and because the Commission found that the waiver requests were not factually justified. See *Waiver of Chassis Radiation Standard*, 62 F.C.C. 2d 544 (1977); *Petitions to Extend Sale Cut-Off Date*, 66 F.C.C. 2d 139 (1977).

materially differentiated petitioner's request for a waiver from others that had been denied (Pet. App. 10a-11a). The primary purpose of the new technical standards for CB radios was to reduce the interference for other communications. This, the Commission concluded, would be undermined if petitioner's practices continued, because the sale of the repaired equipment would create "a new potential source of interference" (Pet. App. 8a-9a).

Petitioner sought review of the Commission's decision, and the court of appeals affirmed (Pet. App. 1b).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of the other courts of appeals. Further review by this Court is therefore unwarranted.

1.a. The Commission has broad authority to regulate the manufacture and sale of radio equipment that is capable of causing harmful interference with radio communications. 47 U.S.C. 302a.³ The regulations prohibiting the manufacture and sale of radios that fail to satisfy minimal technical standards were designed by the Commission to prevent undue radio interference while minimizing any burden placed on manufacturers, sellers or users of citizens band radios. The Commission's determination that these regulations are "consistent with the public interest, convenience, and necessity" (47 U.S.C. 302a(a)) is entitled to considerable deference because this judgment "necessarily involves deductions based on the expert knowledge of the agency." *FCC v. National*

³In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969), the Court noted that government regulation of radio communication is necessary else, "because of the cacaphony of competing voices, none * * * could be clearly and predictably heard."

Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978), quoting, *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

b. Petitioner did not challenge the Commission's rules directly. Instead, petitioner requested the Commission to grant it a waiver from the prohibition on sales of nonconforming equipment. This request was properly denied by the Commission.

An applicant for a waiver of agency regulations bears a heavy burden of demonstrating that a waiver is warranted. *Sudbrink Broadcasting, Inc. v. FCC*, 509 F. 2d 418, 422 (D.C. Cir. 1974); *WAIT Radio v. FCC*, 459 F. 2d 1203, 1207, cert. denied, 409 U.S. 1027 (1972). As the Commission determined (Pet. App. 10a), petitioner failed to meet its burden in this case. Petitioner's waiver application omitted to inform the Commission when the company had acquired its inventory, the reasons why it would be exposed to liability if it did not obtain a waiver, or the extent of the financial impact on the company if the rule were not waived. The absence of such relevant and easily obtainable information was particularly significant because the Commission had denied earlier waiver requests of petitioner and others for precisely the same type of evidentiary failure (Pet. App. 10a). See *Petitions to Extend Cut-Off Date*, 66 F.C.C. 2d 1021, 1024, aff'd, *Arthur Fulmer, Inc. v. FCC*, 569 F. 2d 159 (D.C. Cir. 1977). Moreover, the Commission correctly determined that a continuance of petitioner's practice of repairing and reselling nonconforming equipment would hinder the objectives of the regulation by creating new "source[s] of interference" (Pet. App. 8a). The repair and

resale of defective, nonconforming radios would reintroduce equipment that otherwise would be eliminated from use (*ibid.*).⁴

2. Petitioner contends (Pet. 8-11) that the Commission's regulations deny petitioner the equal protection of the laws. Petitioner's theory is that the Commission may not prohibit the manufacture *and* sale of nonconforming radios because other government regulations eliminating "hazardous or otherwise undesirable consumer products" prohibit only manufacture (Pet. 8-9). This contention is insubstantial.

The "Constitution does not require things which are different in fact * * * to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). There is thus no requirement that CB equipment and other consumer products—such as automobiles (Pet. 9) — be regulated under identical regulations.

Moreover, regulatory distinctions between nonconforming CB's and other "undesirable consumer products" do not involve invidious discrimination. It is sufficient that the different treatment is rational in light of the objective of the regulation. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). See also *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). In this case, the purpose of the Commission's regulation was to reduce interference caused by citizens band radios. The remedy the Commission chose was reasonable, and applies equally to all sellers of those types of radios. Its validity is not affected by the fact that other government agencies have chosen other remedies in the regulation of consumer products that do not create radio interference.

⁴The Commission's regulations do not prohibit repair of nonconforming CB radios at the owner's behest. The regulations do, however, prohibit the sale of nonconforming radios, whether new or repaired.

3. Petitioner argues (Pet. 13-14) that the regulatory prohibition against the sale of nonconforming CB equipment constitutes a taking of property without just compensation (Pet. 13-14). This contention was not raised before the Commission and may not be raised for the first time on judicial review. 47 U.S.C. 405; *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 155 (1946). In any event, the argument is devoid of merit. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122-137 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590, 593-596 (1962).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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